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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GENARO LOPEZ MADUENA, Petitioner.	2 CA-CR 2011-0317-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause Nos. S1100CR200801005 and S1100CR200801452

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Genaro L. Maduena
Winslow
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Genaro Maduena petitions this court for review of the trial court's summary denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In February 2009, Maduena was convicted after a jury trial in CR200801452 of two counts each of sale of a dangerous drug and sale of marijuana and sentenced to a combination of consecutive and concurrent prison terms totaling twenty-five years. We affirmed his convictions and sentences on appeal. *State v. Maduena*, No. 2 CA-CR 2009-0074 (memorandum decision filed Mar. 16, 2010). In September 2009, Maduena was convicted after a jury trial in CR200801005 of sale or transportation of a dangerous drug, possession of a dangerous drug for sale, and possession of a narcotic drug for sale. The trial court sentenced him to concurrent, ten-year prison terms to be served consecutively to the prison terms imposed in CR200801452, and we affirmed those convictions and sentences on appeal. *State v. Maduena*, No. 2 CA-CR 2009-0358 (memorandum decision filed Sept. 3, 2010).

¶3 In April 2011, Maduena filed a notice of post-conviction relief listing both cause numbers. He simultaneously filed a petition for post-conviction relief raising claims of ineffective assistance of trial and appellate counsel and asserting his convictions violated due process as a result of prosecutorial misconduct, because the state did not present all charges to the grand jury in one proceeding and instead obtained several indictments, despite the fact that the charges stemmed from a single investigation. The trial court appointed counsel for Maduena—the same attorney who represented him on appeal in CR200801005. That attorney filed a notice stating she had found "no colorable claims" under Rule 32. The court granted Maduena additional time to file a pro per petition, but Maduena elected to rely on the petition he had filed with his notice.

After evaluating the state's response to that petition and Maduena's reply, the court summarily denied relief.

¶4 On review, Maduena reurges his claims of ineffective assistance of counsel and prosecutorial misconduct and additionally contends he was entitled to different counsel for his post-conviction proceeding because he had raised claims of ineffective assistance of appellate counsel and one of his appellate attorneys had represented him in his post-conviction relief proceeding. We need not address these claims because, as we explain below, his notice for post-conviction relief was filed untimely.

¶5 Rule 32.4(a) requires that a notice of post-conviction relief "be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." *See also* A.R.S. § 13-4234(A), (C). The mandate in Maduena's appeal in CR200801452 issued on April 23, 2010, and the mandate in his appeal in CR200801005 issued on January 5, 2011. He filed his notice listing both cause numbers on April 11, 2011—more than eleven months after our mandate issued in CR200801452 and more than ninety days after our mandate issued in CR200801005. Thus, his notice was filed untimely.

¶6 "Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)." Ariz. R. Crim. P. 32.4(a). Relying on Rule 32.1(f), Maduena stated in his notice that his failure to file a timely notice was without fault on his part because he had never "received the mandate order to either cause number." But Rule 32.1(f) encompasses only the late filing of a notice of appeal or an of-right notice of post-conviction relief. By its plain language, the rule does not permit a non-pleading

defendant, like Maduena,[1] to file an untimely notice of post-conviction relief, irrespective of whether the late filing is "without fault on the defendant's part." Ariz. R. Crim. P. 32.1(f); Ariz. R. Crim. P. 32.1 cmt. (2000 amendment) ("Relief pursuant to subsection (f) [is] unavailable to all post-conviction relief proceedings not 'of-right.'").

¶7 And the time limits set forth in Rule 32.4 are jurisdictional. A.R.S. § 13-4234(G). Maduena has not identified any claim exempt from the timeliness requirement of Rule 32.4. Accordingly, the trial court did not abuse its discretion in summarily denying Maduena's petition. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling if legally correct for any reason).

¶8 For the reasons stated, although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[1]The trial court incorrectly referred to Maduena's filing of an "of right petition." That term encompasses only post-conviction proceedings initiated by "[a]ny person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest," Ariz. R. Crim. P. 32.1, and does not include persons convicted after a jury trial, like Maduena. Moreover, although the court characterized Maduena's notice as "timely," we find no basis in the record to support that conclusion.